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CASES CITED:

Supreme Court,

OF THE UNITED STATES.

WILLIAM NAHMEH,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF.

Statement.

This appeal is from a decree of the United States District Court for the Eastern District of New York, dismissing the libel of the libellant. The question raised is whether under the Act of March 9, 1920, a suit in the nature of a libel *in rem* is properly brought in the district in which the libellant resides even though the *res* is not within the territorial limits of that district.

Facts.

The appellant herein, filed a libel on March 30, 1922, against the appellee, as owner of the *S. S. Quinnipiac,* under the Act of March 9, 1920. He alleged that he resided within the Eastern District of New York, that the appellee owned, operated, managed and controlled the *S. S. Quinnipiac,* that

on or about August 3, 1920, he was employed on this steamship as fireman, and that while so employed and in the performance of his duties he slipped on the deck because of the slippery condition caused by the escape of grease and oil from a certain dynamo and failure to provide proper grating. He further alleged in a second cause of action that because of the appellee's negligent failure to treat, it became necessary to amputate one of his legs (fols. 8-14).

The appellee, appearing specially, excepted to the libel upon the ground, among others, that it did not appear in the said libel, that the steamship *Quinnipiac* was at the date of filing of said libel within the Eastern District of New York, that there is no right *in personam* against the United States, but that the cause of action set forth is an action *in rem* against the Steamship *Quinnipiac,* and that at the time of the filing of said libel the Steamship *Quinnipiac* was not within the Eastern District of New York nor within the territorial jurisdiction thereof, but was within the Southern District of New York and the territorial jurisdiction thereof (fols. 24, 25).

On December 20, 1922, the appellant made a motion, before the United States District Court for the Eastern District of New York, for an order removing this cause to the United States District Court for the Southern District of New York (fols. 36, 37). The proctor for the appellant alleged in his affidavit in support of the motion, that inasmuch as the *S. S. Quinnipiac* was, at the time of the injuries, operated by the United States Transport Steampship Company under a bare boat charter, that, therefore, under a then recent

decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *Cunard Steamship Co.* v. *United States,* 285 Fed. 516, the only district in which suit could be brought is the district in which the vessel is found. The District Court denied the motion to transfer the cause to the United States District Court for the Southern District of New York, and dismissed the libel for want of jurisdiction (fol. 34).

POINT I.

Under the Act of March 9, 1920, the United States District Court for the Eastern District of New York had jurisdiction of the libel.

There is much confusion in the decisions which have attempted to construe Sections 2 and 3 of the Act of March 9, 1920, with the view of ascertaining whether a libel, essentially *in rem,* must be brought in the district where the vessel is found, when the vessel is owned by the Government. The cases divide off into two groups. The first group of cases hold that when the libel is one *in rem,* it must be filed in the district where the vessel is found.

Cunard S. S. Co., Ltd. v. *United States,* 285 Fed. 516;
Axtell v. *United States,* 286 Fed. 165;
Grays Harbor Stevedoring Co. v. *United States,* 286 Fed. 444;
Puget Sound Stevedoring Co. v. *United States,* 287 Fed. 751.

The other group of cases which hold to the contrary are:

Alsberg v. *U. S.*, 285 Fed. 573;
Middleton & Co. v. *U. S.*, 273 Fed. 199;
The Anna E. Morse, 287 Fed. 364.

The only decision of this Court construing the Act of March 9, 1920, is in the case of *Blomberg Bros.* v. *United States,* 260 U. S. 452, 67 Lawyer's Edition 225. In that case, this Court held that the Act of March 9, 1920, did not authorize a suit *in personam* against the United States, as a substitute for a libel *in rem,* when the United States vessel is not in a port of the United States or of one of her possessions. The question, whether a suit *in personam,* as a substitute for a libel *in rem,* can be brought in a district where the vessel is not found, but in which the party suing resides, was not there discussed or passed upon.

The portions of Sections 2 and 3 of the Act of March 9, 1920, pertinent to the question involved in this case, provide as follows:

"Section 2. That in cases *where* if such vessel were *privately owned* or operated, or if such cargo were privately owned and possessed, a *proceeding in admiralty* could be maintained at the time of the commencement of the action herein provided for, a *libel in personam* may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. *Such suits shall be brought in the District Court of the United States for the district in which the parties so suing, or any of*

> *them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found* * * * upon application of either party the cause may, in the discretion of the court, be transferred to any other District Court of the United States." (Italics ours.)
>
> "Section 3. If the libellant so elects in his libel the suit may proceed in accordance with the principles of libels *in rem* whenever it shall appear that had the vessel or cargo been privately owned and possessed a libel *in rem* might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit."

The *Anna E. Morse, supra,* is the only case which undertakes to analytically construe the above quoted sections. In that case the libel sought to recover money paid out by the libellant for the benefit of the vessel, and which it was claimed created a lien upon such vessel. Exception was filed to the libel, because it failed to allege that the vessel was within the jurisdiction of the court at the time of the filing of the libel. The Court overruled the exception, saying in part:

> "Assuming that the words of the Second Section, 'that in *cases where* if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a *proceeding* in admiralty could be maintained' include both a proceeding *in rem* and a proceeding *in personam,* or in other words give a right to proceed against the United States or such corporations in both kinds of libels in all cases where private owners or vessels would be liable, still the words '*such suits* shall be brought

in the District Court of the United States for the district in which the parties so suing or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found' necessarily refers to *all* suits authorized by the Act to be brought against either the United States or such corporation.

The words 'such suits' cannot be held to differentiate between libels 'proceeding in accordance with the principles of libels *in rem*' and those 'seeking relief *in personam*,' as referred to in the Third Section, when both may be joined in the same libel. The words 'such suits' are words of inclusion, and embrace *all suits* authorized by the second section whether proceedings *in rem* or *in personam*. No distinction is made between these different classes of suits as to the place where they may be brought, and the practice to be followed in them must be determined by the provisions of the act where it undertakes to provide for these matters.

There is nothing in the words 'such suits shall be brought, etc.,' indicating that the place of bringing such suits depends in any manner on the right of a private person to bring such suit against a private person at such place, the words are broad and genera,l nor are they limited by any other parts of the act. If the words are given their ordinary meaning, it is immaterial whether the construction be broad or narrow. As the right to file a libel *in personam* was given, which in ordinary cases could only be filed where the defendant could be served, it was no doubt in recognition of the fact that the Government could as readily be served in one district as another that the right of election was given in the

first place to libellant to choose the place of filing the libel so long as one of the parties resided or had its principal place of business or the vessel or cargo could be found there. They were providing for the most convenient place for filing the libel and the most convenient place for trying the cause so permitted to be filed.

As no relief in rem is given by the act, but is expressly denied, together with the right of seizure, and as all relief is limited to that in personam, why should Congress limit the place of filing a libel, in the nature of an in rem proceeding, to the district where the res is found? * * * My conclusion is that, when the vessel is alleged to be at a place shown to be within the jurisdiction of the United States, the libel may be filed in any district of the United States where a party resides or has its principal place of business, or in which the vessel or cargo charged with liability is found." (Italics ours.)

In the case of *Alsberg* v. *U. S.*, *supra*, the question arose whether, under the act here discussed a proceeding in admiralty may be brought against the Government in a district other than that in which the vessel is found, under circumstances in which the vessel, if privately owned, would be liable *in rem*, though the owner would not be liable *in personam*. The Court said:

"But if at the time the proceeding under the act is brought, the vessel is anywhere within the jurisdiction of the United States, so that, if privately owned, a proceeding in admiralty would be maintainable against it in some District Court, I can see no reason for interpreting the clear language of the act so as to limit the venue

> in a suit against the United States to the District Court of the Jurisdiction in which the vessel may then be found."

In *Middleton & Co.* v. *U. S., supra,* it was held that a suit in the nature of a libel *in rem* could be maintained in the district where the libellant resides even though the vessel was not in that district.

As against these authorities, the leading authority contra is the decision of the United States Circuit Court of Appeals, for the Second Circuit, in the case of *Cunard S. S. Co., Ltd.* v. *United States, supra.* The Court there held that a suit, essentially *in rem,* could not be maintained in a district where the vessel could not be found. At page 521, the Court said:

> "In the light of the rules of procedure referred to, it seems obvious to us why Congress adopted the venue clause found in Section 2 of the Act of 1920. In cases in which the libellant has an alternative remedy, he may avail himself of the alternative venue. The possible alternative venue relates, and relates only, to cases in which there is an alternative remedy. In other words, if there is a liability of a vessel and a concurrent liability of the owner, the libellant may, under Section 2 of the Act of 1920 sue where he has his principal place of business or where he finds the vessel. As the United States may be said to be domiciled everywhere within their territory, the rule so construed is exactly the same as between private parties in a suit against the owner of a vessel. The United States being everywhere within their territory, the libellant may sue *in personam*

in the district where he resides and obtain jurisdiction of the respondent, or he may sue *in rem* where he finds the vessel, without concerning himself with the whereabouts of the owner. But where there exists solely the liability of the vessel and no liability of the owner, the libellant must sue under the Act of 1920, as prior to the Act, only in the district in which he finds the vessel.

The general language of the provision as to venue found in Section 2, as of every part of the Act of 1920 must be read in the light of Legislative intent so far as that intent is clearly expressed. Read in the light of that intent, we construe the provision giving permission to sue wherever libellant lives or has its principal place of business relates to those cases in which the proceeding is one which in its origin is essentially *in personam*, and that it does not extend to cases in which the proceeding is one which in its origin is essentially *in rem*, but in which the United States is made by virtue of the act suable *in personam* * * *"

The reasoning of the court in above case is followed in *Grays Harbor Stevedoring Co.* v. *U. S., supra, Puget Sound Stevedoring Co.* v. *U. S., supra,* and in the case of *Axtell* v. *U. S., supra.* All of these cases seem to go on the theory that the Act of March 9, 1920, intended to put the Government in the position and status of a private party, and that, therefore, the rules of venue governing suits between private parties should govern and control suits brought against the Government.

It is submitted that this intention is not evidenced in the Act. The first sentence of Section 3, which provides, that the rules of law and pro-

cedure governing suits between private parties shall apply in suits against the Government, refers to those provisions of Section 3 which follow the first sentence, and the provisions of Section 2, with reference to the venue of suits, are not in any way affected by the first sentence in Section 3.

Under Section 2, the first thing to be determined is whether, "if such vessel were privately owned and operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action," and once it is determined that a proceeding in admiralty could be maintained, then "such suits shall be brought in the District Court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found." Thus, in *Blomberg Bros.* v. *U. S.*, there was only the liability of the vessel, and as the vessel was not within the United States, a proceeding in admiralty could not have been maintained at the time of the commencement of the action, if the vessel or cargo were privately owned, and so, this court correctly held that an action could not be maintained against the United States. But, when the vessel or cargo can be found within the United States, a proceeding in admiralty brought in the district in which jurisdiction can be obtained of the claimant, is not prohibited by the statute. To resort to distinctions between libels *in rem* and libels *in personam*, when such distinctions are not drawn by the statute, is to resort to niceties and distinc-

tions which but adds confusion to the already confused state of the law.

The alternative venue provided for in Section 2, has no reference to the alternative remedies, as held by the Court in *Cunard S. S. Co.* v. *U. S.*, *supra*. It is evident, from the section under discussion, that the alternative venue is really for the purposes of convenience, for it is provided in that section that "upon application of either party the cause may, in the discretion of the court, be transferred to any other District Court of the United States." The reasons which exist for making the venue depend upon the remedy, in suits between private parties, do not exist in a suit against the Government under the act. In the case of a libel against the vessel or cargo owned by a private party, a court has no jurisdiction of the suit unless the *res* is within its territorial or jurisdictional limits—it is the essential of *in rem* suits, but where, as under the act, the liability *in rem* is specifically abolished, then to compel a party to proceed as though the action were *in rem* amounts to sacrificing substance to form. The question of the Court in the case of *The Anna E. Morse* may be appropriately repeated:

> "As no relief *in rem* is given by the act, but is expressly denied, together with the right of seizure, and as all relief is limited to that *in personam*, why should Congress limit the place of filing a libel, in the nature of an *in rem* proceeding, to the district where the *res* is found?"

It is, therefore, submitted that, since the libel was filed in the district in which the party suing resided, that district had jurisdiction of the libel so filed.

POINT II.

The libel was properly filed in the Eastern District of New York even under the decision in *Cunard S. S. Co., Ltd.* v. *United States.*

Assuming for the sake of arugment that the interpretation given Section 2 of the act in the case of *Cunard S. S. Co., Ltd.* v. *U. S.* is correct, *i. e.*, that the libellant cannot avail himself of the alternative venue unless he has an alternative remedy, the libel which was dismissed was properly filed in the Eastern District. The libellant having suffered personal injuries, the right to sue *in rem* or *in personam* thereupon accrued to him. In the *Cunard* case, the Court said:

> "In other words, if there is a liability of a vessel and a concurrent liability of the owner, the libellant may, under Section 2 of the Act of 1920 sue where he has his principal place of business or where he finds the vessel."

POINT III.

The Eastern and Southern Districts of New York having concurrent jurisdiction of some of the waters adjacent to either of the districts, the vessel could be "found" in the Eastern District within the meaning of Section 2 of the Act of 1920.

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vessel could be "found" in the Eastern District within the meaning of Section 2 of the Act of 1920.

The appellee, in its third exception to the libel (fol. 25), alleges that at the time of filing the libel

> "the Steamship *Quinnipiac* was not within the Eastern District of New York nor within the territorial jurisdiction thereof, but was within the Southern District of New York and the territorial jurisdiction thereof."

In *Section 97 of the Judicial Code* it is provided:

> "The District Courts of the Southern and Eastern Districts of New York shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, Nassau, Richmond and Suffolk."

Under this section it has been held that if a vessel is within the waters over which both districts have concurrent jurisdiction, that in such a case the vessel is construed to be in either district for the purpose of obtaining jurisdiction under Section 2 of the Act of 1920.

> *Gefle Manufacktur Aktiebolag* v. *U. S., et al.* (Son. Dist. N. Y., July 24, 1923), 291 Fed. 927.

This case arose on exceptions, to a libel *in personam*, alleging that at the time the libel was filed the vessel was not within the territorial waters of the Southern District of New York. The case was to be decided on the assumption that the vessel was then within the waters of the County

of Kings (in the Eastern District of New York). The libellant elected to proceed as *in rem* and alleged that the *res* was a vessel owned by the United States. The point raised was that though under Section 97 of the Judicial Code (Compiled St. Section 1084) the Court of the Southern District of New York had concurrent jurisdiction with the Eastern District of New York to execute process within the waters of the County of Kings (within the Eastern District), yet the ship must be within the territorial waters of the County of New York (within the Southern District) if the ship is to be regarded as "found" within the district under Section 2 of the Suits in Admiralty Act. The Court held that the jurisdiction of the Southern District being concurrent with the Eastern District over the waters adjacent to the County of Kings, then a libel could be filed in the Southern District where the vessel was at the time within its jurisdictional limits, though not within its territorial limits The Court said:

Section 2 of the Suits in Admiralty Act provides a proceeding *in personam* against the United States whenever "a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for." Later it says, that this libel shall be filed in the district "in which the vessel * * * charged with liability is found." Since, says the respondent, having waited till the Statute of Limitations has run—the vessel was found at a Brooklyn wharf, and this was not within the territorial waters of the Southern District, the libel must be dismissed.

It would be a good argument if the phrase "district * * * in which the vessel * * * is found "meant territorial limits instead of jurisdictional

limits. Under Section 97 of the Judicial Code, the jurisdictional limits of the Southern District include the waters of the County of Kings; the territorial limits do not. The jurisdiction of this Court has nothing whatever to do with the place where the cause or proceeding arose. The phrase is "concurrent jurisdiction over the waters * * * and over all seizures made and all matters done in such waters," strictly the suffix was unnecessary. Nobody ever doubted our jurisdiction to arrest a private vessel at a Brooklyn wharf, though the "matter" was "done" outside the port of New York. It is a complete jurisdictional grant. "All processes * * * shall run * * * in any part of said waters."

Section 2 of the Suits in Admiralty Act was a substitute *pari passu* for the right to proceed *in rem* against the vessel had she been privately owned. "It was intended to substitute this proceeding *in personam* * * * in lieu of the previous unlimited rights of claimants to libel such vessels *in rem*," *Blomberg Bros.* v. *U. S.*, 43 Sup. Ct. 179, 67 L. Ed. (United States Supreme Court, January 2, 1923). *Wherever the ship could be arrested, if privately owned, in that district the libel would lie in personam. She "is found" in a district where she can be found by the process of that district. Territorial boundaries as distinct from jurisdictional have no functional relation to the statute at all"* (italics ours). Only in this way can the libel *in personam* be a "substitute" for the preceding libel *in rem*."

The claimant's exception 3, does not therefore show or allege that the vessel was not within the jurisdiction of the Eastern District, by merely

alleging that the vessel was within the territorial boundaries of the Southern District, inasmuch as some of the territory of the Southern District is within the jurisdictional boundaries of the Eastern District.

CONCLUSION.

The order of the United States District Court for the Eastern District of New York, dismissing the libel herein for want of jurisdiction, should be reversed.

Respectfully submitted,

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